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NTSB Order No. EA-3961

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of August, 1993

_____	)	
JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11626
v.	)	
	)	
CHARLES ROHR,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on October 16, 1991, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 120 days on allegations of violations of sections 91.9(a), 91.103(b)(2), and

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<sup>1</sup>An excerpt of the hearing transcript containing the initial decision is attached.

91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.<sup>2</sup>

The facts underlying the allegations are set forth in the Administrator's order, which was filed as the complaint in this matter, and are as follows:

2. On October 1, 1988, you were pilot in command of a Thunder and Colt (T&C) Model 160A Balloon, Civil Aircraft N930BC, the property of another, operating in air commerce at Fiesta Balloon Park, Albuquerque, New Mexico. You carried passengers on board the aircraft at the time.

3. The approved flight manual for the T&C Model 160A

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<sup>2</sup>FAR sections 91.9(a), 91.103(b)(2), and 91.13(a) provide as follows:

"§ 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§ 91.103 Preflight action.

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. This information must include....

(b) For any flight, runway lengths at airports of intended use, and the following takeoff and landing distance information....

(2) For civil aircraft other than those specified in paragraph (b)(1) of this section, other reliable information appropriate to the aircraft, relating to aircraft performance under expected values of airport elevation and runway slope, aircraft gross weight, and wind and temperature.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Balloon states that the maximum number of persons that may be carried in the aircraft is nine (9) and the maximum lift-off weight is 1,300 KG.

4. At the time of the above flight, N930BC had ten (10) persons on board and was loaded such that it exceeded its maximum lift-off weight.

5. At the time of the above flight, you failed to familiarize yourself with all available information concerning the performance of your aircraft taking into consideration its gross weight, the elevation of the launch site, wind and temperature.

6. During the above flight, N930BC lifted off clearing powerlines by approximately ten (10) feet. Once the powerlines were cleared the aircraft did not sustain flight and impacted the ground near the edge of [a] large embankment. The gondola was carried down the embankment striking the ground and tossing passengers about.

The primary issue contested before the law judge was whether respondent was the pilot in command (PIC) of the hot air balloon involved in this incident. The law judge, after hearing the witnesses and evaluating the credibility of their testimony, and upon her consideration of written statements entered into evidence, concluded that a preponderance of the evidence established that respondent was the PIC. Respondent contends on appeal that her decision was erroneous. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision. For the reasons that follow, we deny respondent's appeal.

The Balloon Fiesta is a ten-day event held annually in Albuquerque, New Mexico. Balloonists from all over the world attend, and there is a great deal of media coverage. Respondent is a renowned balloonist who has over 7,000 hours of flying

experience. He has run a balloon instruction school since 1978, is designated by the Federal Aviation Administration (FAA) as a flight examiner, and is a balloon distributor for the southeast portion of the United States. According to respondent, most of the balloons he owns and uses are 105,000 cubic feet in size.

Thunder & Colt is a manufacturer of balloons, and Balloon Corporation of America (BCA) had erected a hospitality tent at the Fiesta in order to market Thunder & Colt (T&C) products. Part of the marketing strategy was apparently to take members of the media in groups, for hot air balloon rides. On the day in question, the media gathered in the T&C tent, waiting for assignments to a balloon with a pilot. All of the pilots present in the tent wore yellow jackets labeled "T&C," including respondent and a pilot named Chuck Foster.

According to respondent, officials from BCA had been pressing him to buy a T&C 160A (160,000 cubic foot) hot air balloon.<sup>3</sup> Respondent had been in one only once before, over the Fourth of July weekend, with a BCA representative. On the day in question, respondent claims that the Sales Director and the President of BCA had invited him to try out the T&C 160A. They told him that in order to be the PIC, their insurance required that he have five hours of flight time, so Chuck Foster would accompany respondent in order to "check him out." Respondent insists that Chuck Foster was, therefore, the PIC of the

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<sup>3</sup>According to Chuck Foster, respondent had already agreed to be the T&C distributor for the southeast region, and BCA wanted him to own at least one balloon for demonstration purposes.

balloon.<sup>4</sup>

Respondent claims that Chuck Foster performed a walk-around inspection of the balloon with him. Respondent admits that he did not bother to calculate the weight of the passengers because he relied on the knowledge and experience of the President and the Sales Director of BCA, and Chuck Foster, a national distributor of T&C balloons, to ascertain that information. Respondent testified that both pilots boarded the pilot compartment together, and 8 members of the press subsequently boarded the passenger compartment of the balloon. The evidence is uncontroverted that at the time of this operation, the maximum number of persons who could be on board was 9.<sup>5</sup>

Respondent asserts that the decision to actually take off was made by both pilots (TR-316), although he admits that when the balloon took off, it was he who manipulated the controls. (TR-315). He claims that he continuously asked Chuck Foster for comments on his operation. The balloon was sluggish on take-off, and respondent admits that he said that he may have commented that it was a little heavy (TR-304), but he testified that what he meant was that they did not have equilibrium. Respondent also

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<sup>4</sup>Respondent's counsel suggested in a letter to respondent that if Foster and the BCA officials testified that respondent was not the PIC, he could "beat this for you." He also suggested that respondent should tell Mr. Foster "...that the six month rule [the Board's stale complaint rule] will make it virtually impossible for the FAA to go after Chuck Foster. Thus both of you will get off free." (Administrator's Exhibit A-20).

<sup>5</sup>In 1991 the maximum number of occupants was deleted from the flight manual and the maximum authorized take-off weight was increased.

admits that during the course of the flight, he alone manipulated the burners. (TR-316). When it became apparent that the balloon was descending into powerlines, Chuck Foster took control of the balloon by turning on all of the burners. He then pulled the red line to deflate the balloon, and the balloon made a hard landing.

Several of the passengers were slightly injured.<sup>6</sup> Respondent claims that Foster pulled the red line to deflate the balloon when he realized that the balloon envelope was misplaced, and not because the balloon was overweight.

Chuck Foster denies that he was the PIC. He is also a renowned balloonist, with 4,000 hours of experience, and he has owned a balloon company for 17 years.<sup>7</sup> He owns three T&C 160As, and he was the west-coast distributor for T&C at the time of the incident. He agrees that the owner of the balloon asked him to convince respondent to buy some of these new balloons, but he denies that he was asked to give respondent a familiarization flight. He claims that the balloon was assigned to respondent as the pilot. He notes that he did not attend the pilot briefing. He also denies pre-fighting the balloon, nor did he fire it up or manipulate the burners on take-off. When the balloon seemed sluggish on take-off, Foster states that he even offered to get out, but respondent said it would be fine. Foster admits that when he realized the balloon was descending into the powerlines,

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<sup>6</sup>The record reveals that, as a result, there is civil litigation pending against all of the parties involved in the operation of the balloon.

<sup>7</sup>Foster testified that he has known respondent for 15 years.

he turned on two more burner valves, and he believes it was he who determined that the flight should be discontinued because the top was off-center. He does not know if he took "control," at that point, but he knows he never told respondent to "stand back." (TR-174). Foster opined that the balloon's descent near the powerlines was caused by the fact that the balloon was overweight and because of the loose top. Foster noted that FAA regulations require only that a balloonist be current in that category of balloon, i.e., airborne with heater, in order to operate with passengers.<sup>8</sup> Although Foster was not aware that respondent had little or no experience in flying a 160A balloon, he scoffed at the suggestion that respondent, a highly experienced balloonist, would need Mr. Foster to explain to him how to fly this balloon. (TR-382).

An FAA inspector prepared a memorandum on the day of the incident, or the day after, in which he indicated that he had interviewed respondent in the T&C tent, and in which he states that respondent admitted he was the PIC.<sup>9</sup> Respondent denies that he was interviewed by an FAA inspector at the Fiesta, and suggests that perhaps a BCA official may have posed as him. Contrary to the claims contained in respondent's appeal brief, none of the passengers identified Chuck Foster as the PIC. One passenger testified that she did not know which of the two pilots

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<sup>8</sup>See FAR § 61.57(c).

<sup>9</sup>The inspector, now retired, has little recollection of his investigation.

was in control of the balloon. One passenger indicated in a written statement that she was introduced to both pilots in the tent, but that when the passengers boarded, respondent was already on board and he asked if Chuck Foster was coming. According to this passenger, only then did Foster get into the basket. Furthermore, she indicated that "[a]t that time Chuck Rohr kept the burners going at a consistent rate." This passenger also indicates that respondent commented that the basket might be too heavy, that respondent operated the burners constantly while the ground crew tried to push the balloon off, and that during the descent, respondent instructed the passengers to bend their knees. (Exhibit R-5). Another passenger indicates in a written statement that he was introduced to both pilots, and that Chuck Foster gave him his card, but he refers to both respondent and Foster as "the pilots" throughout his written statement. This passenger also heard respondent make the comment about the basket being heavy. (Exhibit R-4).

The law judge determined, based on all of the evidence, that respondent was the PIC of the balloon. In her oral initial decision she makes clear that she considered respondent's admission to the FAA inspector critical, and that she rejects as incredible respondent's suggestion that someone else posed as him in order to make that admission. The law judge also notes that the passenger's descriptions show that respondent was in control of the balloon until it began its descent into the powerlines, and that it was respondent who instructed the passengers to



prepare for the hard landing. The law judge also made a credibility determination in favor of Chuck Foster, finding that she believed him when he testified that he would not presume to give instruction to respondent, who is a renowned balloonist in the balloon community. The law judge also rejected respondent's claim that Foster performed a walk-around inspection with him, noting that one of the passengers heard respondent ask where Foster was, and saw Foster enter the pilot compartment after the passengers had already boarded, which is contrary to the version of events as testified to by respondent.

In the Board's view, the law judge's determination that respondent was the PIC of this balloon was reasonable and is supported by more than a preponderance of the evidence. Furthermore, respondent offers us no persuasive reasons to disturb the credibility findings of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited therein (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

Finally, we reject respondent's attacks with regard to the law judge's findings concerning his failure to properly pre-flight the balloon and his operation of the balloon contrary to the limitations set forth in the flight manual. The undisputed evidence is that, at the time of this flight, the maximum number of persons allowed according to the operating limitations was 9, but that respondent, as pilot-in-command, permitted 10 persons on

board. The fact that the tables were subsequently revised is irrelevant to the finding of a violation of FAR section 91.9(a) at the time of the incident. Respondent also admitted that he failed to calculate the weight of the passengers and their equipment in order to insure that he would not exceed the maximum take-off weight, and that admission is sufficient to sustain the finding of a violation of FAR section 91.103(b)(2). As to the law judge's attempt to calculate the weight of the balloon on take-off, we do not think that her conclusion that the balloon exceeded the maximum allowable lift-off weight is unreasonable, based on her estimate that the average weight of the 10 people on board was 150 pounds, when she knew that several of the passengers' weights actually exceeded that estimate. In any event, the finding of a violation of FAR section 91.13(a) is residual to the findings of operational violations, and we do not think it was critical for the Administrator to establish the actual weight of the balloon on take-off in order to prevail on that charge.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 120-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.<sup>10</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).